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STATUTES

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
HAVERHILL TYPOGRAPHICAL UNION No. 38,
WORCESTER TYPOGRAPHICAL UNION No. 165,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners International Typographical Union and its Local Unions Nos. 38 and 165 jointly pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled cases on May 10, 1960.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 278 F. 2d 6, and is reprinted in Appendix "A" pp. 1a-16a *infra*. The Decision and Order of the National Labor Relations Board is reported at 123 NLRB 806.

JURISDICTION

The decree of the Court of Appeals was entered on May 10, 1960. A petition for rehearing filed by petitioners was denied on June 10, 1960. On June 15, 1960, the decree of the Court was stayed to allow the filing of this petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether a contractual proposal by a union that,

> "The General Laws of the International Typographical Union, in effect at the time of the execution of this agreement, not in conflict with federal or state law, shall govern relations between the parties on those subjects concerning which no provision is made in this contract,"

and a strike to secure agreement on such proposal, violates Section 8(b) of the National Labor Relations Act, as amended (61 Stat. 136; 29 U.S.C., Sec. 151 *et seq.*)

2. Whether contractual proposals by a union that,

> "The operation, authority, hiring for and control of each composing room shall be vested exclusively in the office through its representative, the foreman, who shall be a member of the Union . . . The Union shall not discipline the Foreman for carrying out written instructions of the publisher or his representatives authorized by this Agreement,"[1]

and a strike to secure agreement on such proposals, violates Section 8(b) of the Act.

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[1] If this Court should sustain the decision of the Court below on these issues, the case then will also present the questions (a) whether the Board's Order, as enforced by the Court, is sufficiently narrow

STATUTES INVOLVED

The case involves Sections 2(3), 2(11), 8(b)(1), 8(b)(2), 8(b)(3), 8(d), 13 and 14(a) of the National Labor Relations Act as amended. They are printed as Appendix "B" to this petition (pp. 44a-45a).

STATEMENT OF THE CASE

On separate charges filed by the Haverhill Gazette Company, Haverhill, Massachusetts, against Haverhill Typographical Union Local No. 38 and the International Typographical Union (herein "ITU"), and by Worcester Telegram Publishing Company, Inc., Worcester, Massachusetts, against Worcester Typographical Union Local No. 165, and the ITU, a consolidated hearing was held which, after the usual proceedings, resulted in the order of the National Labor Relations Board of April 17, 1959, of which review was sought below. This petition seeks review of such portions of the judgment below as upheld the Board.

For many years, the named locals had represented the composing room employees of the charging employers. After separate fruitless negotiations for agreements, extending over long periods of time, these employees went on strike in November, 1957. While the parties were apart on a great many issues, including wages, the most important here were the "laws clause" (JA 351, 398) and the foreman clauses (JA 349, 397) set forth above under "Questions Presented". Additionally, the Board found that the strike for a

and specific within the rule of *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941) and (b) whether the International Typographical Union can be held responsible within the rule of *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 393-96 (1922). We reserve these questions to our brief on the merits if this petition is granted.

jurisdiction clause, and the apprenticeship and priority provisions of the agreement, violated Section 8(b) (JA 444-449, 481), but these findings were not approved by the Court below.

The Board found that the "General Laws" clause was unlawful on the theory that "there is no evidence in the record remotely suggesting that the Respondents were not seeking to incorporate all the general laws, including those found unlawful herein, in the proposed contracts" (JA 455), and that the clause was not "saved" by the "not in conflict with law" provision because a "'savings clause' of this general character is ineffective to eliminate the illegal provisions of the general laws" (JA 455), relying on certain decisions of the Court of Appeals for the Second Circuit epitomized by *NLRB* v. *Red Star Express Lines*, 196 F. 2d 78 (1952). The Court below, while conceding that "The question is not free from doubt" and that "some inferences to the contrary" might be drawn from the opinion of the Court of Appeals for the District of Columbia in *Honolulu Star-Bulletin* v. *NLRB*, 274 F. 2d 567 (1959), adopted the Board's reasoning, also relying on the *Red Star Express* line of decisions. (App. 12a-14a).

The Board held that the foreman clauses violated Section 8(b)(1)(B) on the ground that a strike for these clauses was an effort to "restrain and coerce" the employers in the selection of their representatives for the adjustment of grievances (JA 449); and violated Section 8(b)(2) on the ground that "where employers entrust their hiring to foremen who are members of the union and bound by its laws, they in effect agree with the union . . . to operate under a closed shop agreement" (JA 449). The Court below, while noting that the findings of the Board were "fragmentary and far

from clear", (App. 9a) sustained these holdings, but on an entirely different ground; i.e., that "the effect of the clause would be to cause the employer to discriminate in favor of union men in appointing their foremen, thereby encouraging aspirants for that position to join the union". (App. 10a).

The Trial Examiner found, and neither the Board nor the Court disturbed the finding, that ". . . the Respondents . . . were desirous of securing contracts with the companies" (JA 456). The Board nonetheless found that the petitioners had refused to bargain collectively in good faith by striking in these circumstances, (JA 455-456), and that they had thereby violated Section 8(b)(3). The Court below, describing the union demands as "clauses of honestly disputable validity at the time of the union action" (App. 14a), held that the unions "were acting at their peril" (id.) and sustained the Board in finding an illegal refusal to bargain. The Court also sustained the finding of the Board that the ITU was jointly responsible with its local unions, and in certain respects limited the Board's order.

REASONS FOR GRANTING THE WRIT

I. The Importance of the Questions Presented

This case presents important problems in the interpretation and administration of the National Labor Relations Act. It presents the issue whether the rules of a union, insofar as they are "not in conflict with federal or state law," may govern working conditions not covered by a collective agreement. This, in turn, raises the question whether the Board and the courts, by describing this language as words of "incorporation by reference" rather than "exclusion" may use this technique to police proposals made in the course of negotiations. On this issue there is a square conflict

between the Court below, and the Courts of Appeals for the District of Columbia and Second Circuits.

It also presents the issue whether unions may lawfully demand, and strike for, a contractual commitment that foremen be union members. This is a matter of importance in the printing, maritime, building construction and other industries where foremen have traditionally been union members. On this issue there is likewise a square conflict between the Court below, and the Courts of Appeals for the District of Columbia and Second Circuits.

Underlying these issues is the basic question whether the Board and the courts are authorized to declare discrete and isolated proposals made in the course of collective bargaining, before any agreement has been reached, and strikes in support thereof, unlawful; contrary, we believe, to the decision of this Court in *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952) and the line of authority stemming therefrom.[2]

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[2] The case also deals with issues which have been the subject of litigation since passage of the Taft-Hartley Act in 1947 and which should be put definitively to rest. Contracts in all respects identical to those herein involved were before the Board in *Matter of International Typographical Union*, 86 NLRB 951 (1949); before the Seventh Circuit in *NLRB* v. *International Typographical Union*, 193 F. 2d 782 (1951), *cert. den.* 344 U.S. 816; and before the District Court for Northern Indiana in *Evans* v. *ITU*, 81 F. Supp. 675 (1948), where they were specifically found to be not unlawful, a finding from which the Board took no appeal. Additionally, they were the subject of charges filed by the American Newspaper Publishers Association in Case No. 9-CB-74, which were dismissed administratively without hearing in April, 1955. The decree entered in *NLRB* v. *ITU*, *supra*, broadly enjoined any violations of Sections 8(b)(1)(B), 8(b)(2) and 8(b)(3); no contempt action has ever been brought under it. As recently as 1957, the Board took no issue with a Trial Examiner's report finding these contract

Agreements in the form proposed by these petitioners are the custom and practice in the industry, and the Board's efforts to stigmatize them as illegal have seriously interfered with collective bargaining. This is particularly true because of the Board's efforts to apply the *in terrorem Brown-Olds*[3] remedy to parties entering into them. *Matter of News Syndicate*, 122 NLRB 818, 827; *Matter of Honolulu Star-Bulletin*, 123 NLRB 395, 408. Employers are understandably reluctant to enter into agreements under which, to cite *News Syndicate* as an example, they may be penalized to the extent of some four hundred thousand dollars. Because the Board has required the ITU to litigate and relitigate this issue, despite this proceeding and *Honolulu Star-Bulletin* and *News Syndicate*, several cases now at lower levels await decision in this case.[4] Moreover, the Board has invalidated, on the same theory it

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clauses to be lawful. *Kansas City Star*, 119 NLRB 972, 986, fn. 12 (1957). For a period of some twelve years, these practices have been followed with the full knowledge of the Board, without objection until the present cases, thus raising the issue of the appropriate weight to be given this settled administrative practice under the rule of *Norwegian Nitrogen Products* v. *U.S.*, 288 U.S. 294, 315 (1933) and *U.S.* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956).

[3] *United Association of Journeymen, etc. Local 231, et al.*, 115 NLRB 594 (1956). This question is before this Court in *Local 60, Carpenters* v. *NLRB*, No. 68, October Term, 1960 and *NLRB* v. *Local 357, Teamsters*, No. 85, *cert. granted* June 27, 1960, 363 U.S. 837.

[4] *Los Angeles Mailers Union # 9 and Hillbro Newspaper Printing Co.* v. *NLRB* (pet. for review pending in CADC Nos. 15721 and 15770); *New York Times and New York Mailers Union # 6*, 2-CA-6432, 2-CA-6433, 2-CB-2504; *Newspaper Agency Corp. and Salt Lake City Mailers Union # 21*, 20-CA-1556, 20-CB-658; *Tribune Publishing Co. and San Francisco-Oakland Mailers Union # 18*, 20-CA-1553 and 20-CB-657.

applied to the "laws" clause, contracts in industries as diverse as mining,[5] music[6] and shipping.[7]

II. The Conflict With Honolulu Star-Bulletin and News Syndicate

In *Honolulu Star-Bulletin* v. *NLRB*, 274 F. 2d 567 (November 25, 1959), the Court of Appeals for the District of Columbia, and in *NLRB* v. *News Syndicate Co. Inc., et al.*, — F. 2d — (May 20, 1960), the Court of Appeals for the Second Circuit, had before them clauses substantially identical to those before the Court below, and in each case unanimously found them to be lawful. We set forth in tabular form the contract language in each case:

Honolulu (App. 19a)	*News Syndicate* (App. 28a)	*Worcester* (JA 351)[8]
Section 24 (c). It is understood and agreed that the general laws of the International Typographical Union in effect January 1, 1956, not in conflict with federal and territorial (state) law, shall govern relations between the parties on conditions not specifically enumerated herein.	Section 24. It is understood and agreed that the General Laws of the International Typographical Union, in effect January 1, 1955, not in conflict with this contract or with federal or state law, shall govern relations between the parties on conditions not specifically enumerated herein.	Article I, Section 7. T General Laws of the Intern tional Typographical Uni in effect at the time of t execution of this agreeme not in conflict with feder or state law, shall gove relations between the parti on those subjects concerni which no provision is ma in this contract.

[5] *Perry Coal Co.*, 125 NLRB # 110, 45 LRRM 1251 (1959) refusing to follow *Lewis* v. *Quality Coal Co.*, 270 F. 2d 140 (CA 7, 1959) *cert. denied*, 361 U.S. 929 (1960). This case is now pending on petition for review in CA 7, Nos. 12889 and 12915.

[6] *Cavendish Record Mfg. Co.*, 124 NLRB # 166, 44 LRRM 1622 (1959); *Columbia Broadcasting System*, 21-RC-5709, decided Dec. 29, 1959 (unpublished).

[7] *Longshoremen's Union*, 127 NLRB # 9, 45 LRRM 1501 (1906).

[8] The identical language was in the Haverhill proposal, Art. I § 8, except that the laws effective January 1, 1956 were expressly referred to. (JA 398). See App. 4a-5a.

Honolulu (123 NLRB 395, 402)	*News Syndicate* (122 NLRB 818, at 835)	*Worcester* (JA 349)[9]
Section 18: Foreman: The foreman is the only recognized authority in carrying out the instructions of the Employer in the composing room. (No specific requirement that the foreman be a union member, but found by the Board to be required by Art. V, Sec. 10 of the General Laws. See 123 NLRB 395, 402.)	Section 4: Superintendents and Foremen and Assistant Foremen shall be appointed and may be removed by the Publishers, and shall be members of New York Mailers' Union No. 6. Section 20 (a). The operation, authority and control of each mail room shall be vested exclusively in the office through its representative, the Foreman. Section 20 (c). The union shall not discipline the Foreman for carrying out the instructions of the publisher or his representative in accordance with this agreement.	Art. I, Section 5. The operation authority, hiring for and control of each composing room shall be vested exclusively in the office through its representative, the foreman, who shall be a member of the union . . . The union shall not discipline the foreman for carrying out written instructions of the publishers or his representatives, authorized by this Agreement.

Though *Honolulu Star-Bulletin* was decided well before the instant case, the Government did not seek certiorari. *News Syndicate* was decided after this case. That opinion was presented to the Court below by petition for rehearing, which was summarily denied with no statement of reasons. The opinions in both cases are appended to this petition, (App. pp. 17a-43a) and they are in direct and irreconcilable conflict with the decision below.

a. The "Laws" Clause

In all of these cases it has not been disputed that certain of the ITU General Laws, which antedate the passage of the Taft-Hartley Act, contemplated closed-shop conditions. The ITU has urged that these laws have a valid scope of operation in enterprises not affecting interstate commerce within the rule of *NLRB* v. *Fainblatt*, 306 U.S. 601 (1939), and in Canada where the ITU has many subordinate unions and where the Taft-Hartley Act has no application. It is not dis-

[9] The identical language was in the Haverhill proposal. (JA 397) See App. 4a.

puted that the language "not in conflict with law" was inserted in the laws clause after passage of the Taft-Hartley Act (JA 274, 280); *Matter of ITU*, 86 NLRB 951, 1003 (1949). The manifest purpose of the language was to *exclude* from agreements any General Laws in circumstances which would entail a violation of Federal or State law. Nonetheless, the Board, by the use of a Pickwickian logic, has persisted in speaking of this as "incorporation by reference."

The Court of Appeals for the District of Columbia in *Honolulu* had little problem with the matter. It noted (App. 19a) that

> "Section 24 (c) [the "laws clause"] as shown by the above quotation, clearly provided that the General Laws of the Union in conflict with either federal law or the contract itself were not included in the contract. A closed shop provision would have been in conflict with the federal law and also in conflict with Section 2 (a) of the contract. Any such provision in the General Laws was excepted from inclusion in the contract. We do not see how language could have been clearer."

Judge Prettyman for the Court described the Board's reading (App. 21a) as

> ". . . a complete *non sequitur*. An erroneous impression of plain terms does not change the meaning of those terms . . . assumptions that employees will not understand a lawful contract cannot be the basis for holding the contract illegal. What would be the justification for emphatic insistence upon formal collective bargaining as to terms of employment, if the conduct of the parties is to be judged by speculative, uninformed impressions of those terms instead of by the terms themselves as hammered out at the negotiation table?"

The Court expressly held the *Red Star* line of cases inapplicable to a contract lawful on its face, as this one is. (App. 19a, fn. 2). The Court pointedly inquired (App. 22a) "What could be more confusing to rank-and-file employees than an official ruling that a contract which says they need not be members means that they must be members?"

Judge Hincks for the Second Circuit, in *News Syndicate*, enthusiastically followed the opinion in *Honolulu*, and commented (App. 27a) that "Because of our substantial agreement with the penetrating and sound conclusion of that Court, we shall have less to say on this aspect of the instant controversy than if the argument had not already had such authoritative judicial consideration". He observed that the agreement "did not purport to incorporate illegal provisions of the General Laws, but only those which were 'not in conflict . . . with federal or state law' ". (App. 30a-31a). He said of the *Honolulu* opinion that "Its real thrust was its rejection of the same incorporation by reference argument here urged" (App. 31a, fn. 10), and on this ground followed the District of Columbia Circuit in holding that the *Red Star* line of cases had no application (App. 30a-31a). We are informed that the Government will seek certiorari in *News Syndicate*.

The Court below reached a directly contrary result. It first sought to avoid the problem altogether by dismissing it as "an issue of semantics" (App. 12a, fn. 13). But an essential question of contract interpretation is not a logomachy or play on words, the sense in which the Court apparently intends the word "semantics". In any event, it adopted the Board's reasoning in stating (App. 13a, fn. 14) that

"We perceive no reason why the coercive effect of the illegal clauses would be lessened if, *as in this case, they are incorporated by reference into the contract,* rather than written into the contract itself." (emphasis supplied). It expressly held *Red Star* to be applicable and expressly refused to follow *Honolulu Star Bulletin.* (App. 14a).

The Sixth Circuit in *Fentress Coal & Coke Co.* v. *Lewis,* 264 F. 2d 134, 136, (CA 6, 1959), and the Seventh Circuit in *Lewis* v. *Quality Coal Corp.,* 270 F. 2d 140, 143, (CA 7, 1959), *cert. den.* 361 U.S. 929, (1960) on which the Second Circuit relied (App. 30a), have additionally held that the *Red Star* line of decisions has no application to contracts in the coal mining industry similar to those herein involved.

Important democratic values are involved in this issue.[10] Moreover, in no case, including this, has it been

[10] The ITU has been consistently pointed to as the most democratic of American trade unions. Lipset, Trow and Coleman, *Union Democracy* 3-4, (1956); Magrath, *Democracy in Overalls,* 12 Industrial and Labor Relations Review 501, 511-513 (July 1959); Bromwich, *Union Constitutions,* A Report to the Fund for the Republic, July, 1959, p. 39. The General Laws are the device by which the membership through convention action or referendum vote can exercise a direct voice in determining conditions of labor. We conceive that members should have the freedom to adopt such laws as they choose without Government supervision and that the slight chance that this may result in a violation of civil law should not override the freedom to make even wrong choices. The origin and function of the General Laws are well discussed in *Matter of ITU,* 86 NLRB 951, 970. Actually, there has been little problem; no charge alleging discrimination was even filed against any local union of the ITU until 1955 in *Matter of Kansas City Star Co.,* 119 NLRB 972, in which two Board members dissented, and the findings of discrimination sustained in *Honolulu Star-Bulletin* and *News Syndicate* were at once so trivial and doubtful that the Courts of Appeals adopted the unusual practice of

alleged, or proven, that such agreements were proposed or entered into with the intent that they be illegally applied. The Board, by a patent mis-reading of unambiguous language, has thus sought to use the "laws clause" as a device to police contract language which a Union may propose in the course of collective bargaining.[11]

b. The Foreman Clauses

The Board held, and the Court below sustained the holding (App. 9a-11a) that the demand for the foreman clauses violated Sections 8(b)(1)(B), 8(b)(2) and 8(b)(3) of the Act. Preliminarily, the Court below noted that the reasoning of the Board is "fragmentary and far from clear" (App. 9a). Under the well-settled rule of *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196-7 (1947); 318 U.S. 80, 93-95

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remanding to the Board rather than enforcing them. (App. 25a; 43a). The Board has never made the slightest effort to show that the contract clauses here proposed had, over the period of more than a decade that they have been in use, the gruesome consequences with which the Board hypothetically invests them. To the contrary, *Honolulu Star-Bulletin* and *News Syndicate* both demonstrate that these agreements can be, and have been, applied non-discriminatorily. (App. 20a; 37a-42a).

[11] The "General Laws" have a dual aspect. In one respect, they are work rules, covering relationships with employers. In another, they are membership rules, setting forth the minimum conditions under which the members agree among themselves to sell their labor. To the extent that they are membership rules, we feel that they fall within the protection of the proviso to Section 8(b)(1)(A) that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein". See, e.g., Legislative History of the Labor Management Relations Act, pp. 1139-43 (Gov't Print. Off., 1948); *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 620 (1958); *Matter of ITU*, 86 NLRB 951, 955-57, *aff'd.* 193 F. 2d 782, 800 (CA 7, 1951); *NLRB* v. *Amalgamated Local 286, etc.*, 222 F. 2d 95, 98 (CA 7, 1955).

(1943) and *U. S. v. Chicago, M., St. P. and P.R. Co.*, 294 U.S. 499, 511, (1935) this called for a remand to the Board for clarification, as was pointed out to the Court on petition for rehearing.

Substantively, the holding, and the reasoning supporting it, are directly in conflict with *Honolulu Star-Bulletin* and *News Syndicate*. In *Honolulu*, the Court said, (App. 20a)

> "The Board presents two contentions in support of its view. The first is that since the foreman was a Union man it must be assumed that he would be guided in his hiring by the Rules of the Union rather than by the contract between his employer and the Union . . . a similar argument was made to this Court in Carpenters District Council v. NLRB[12] and was rejected."

In *News Syndicate*, the Court adopted similar reasoning. It said (App. 35a),

> "By these provisions [of the agreement] the parties clearly indicated that the foremen are *solely* the employers' agents and that they are under an obligation to act in accordance with the agreement, in spite of union ties and obligations which otherwise might control." (citing cases). (emphasis in original)

The Court below adopted reasoning in support of the Board's conclusion not advanced by the Board and on which no findings were made.[13] It stated (App. 10a).

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[12] 274 F. 2d 564 (CADC, 1959). There the Court held that since the foreman was the agent of the employer, and not of the Union, the Board's assumption was unwarranted.

[13] As the Court below noted (App. 11a), "in the Haverhill case the foreman clause was not a key issue". The Trial Examiner found (and the finding has not been challenged) that the position

> "Not only would the clause as proposed by the unions limit the employers' choice of foremen to union members, but it would also give the unions power to force the discharge or demotion of a foreman by expelling him from the union."

But the clause stated that "The operation, authority, hiring for and control of each composing room shall be vested in the office through *its* representative, the foreman . . .". (emphasis supplied). The clause did not seek to impair in any way the employer's right to select whomever it wished as foreman, subject to the requirement that he be or become a member of the union. The issue is therefore whether, under Section 8(b)(1)(B), a union may properly impose a condition (in this case, union membership) upon the person selected. In *NLRB* v. *Garment Workers Union*, 274 F. 2d 376 (CA 3, 1960), the Court held that the imposition of such a condition (in that case, that the employer's representative not have been previously employed by the Union) did not violate Section 8(b)(1)(B). See *NLRB* v. *Kentucky Utilities*, 182 F. 2d 810 (CA 6, 1950)

The second ground of the Court's holding is flatly contradicted by the language of the proposal itself; i.e., that "The Union shall not discipline the foreman for carrying out written instructions of the publisher or his representatives authorized by this agreement", as

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of the Company negotiators at Worcester was that "the Company had no objection to his (the foreman) being a Union member, but could not agree to make Union membership mandatory" (JA 432). Since both Companies already had Union foremen (JA 36, 170), there was thus no dispute as to who the foreman should be, and hence it cannot properly be claimed that the petitioners, by these contract demands, were seeking to influence (let alone "restrain or coerce") the employers in their "selection" of a representative.

the Second Circuit noted in *News Syndicate* (App. 35a).

The Board's finding that the clause was illegal rested on its assumption (JA 449) that "where employers entrust their hiring to foremen who are members of the union and bound by its laws, they in effect agree with the union . . . to operate under a closed shop agreement". In our view, an agreement either provides for a closed shop, or it does not, and analysis is not assisted by slippery elisions such as " in effect". The Court below tacitly, and both the District of Columbia and Second Circuits explicitly, rejected this ground of decision (App. 35a).[14]

In adopting Section 8(b)(1)(B), Congress was primarily concerned with union demands for industry-wide bargaining. See *Legislative History, supra,* n. 11, p. 1012 (remarks of Senator Taft), p. 1077 (remarks of Senator Ellender) and p. 1339 (remarks of Senator Thomas). Secondarily, it was concerned with union demands that "We do not like Foreman Jones, and therefore you have to fire him or we will not go to work" (id. at page 1012). Congress did not intend to limit the right to strike under Section 13 of the Act (See *NLRB* v. *Drivers Local Union,* 362 U.S. 274

[14] The legislative history of the Act demonstrates that the Congress had no wish to change accepted practices in the building, maritime, printing, and other industries with respect to the duties and union membership of foremen. Senate Rpt. 105, 80th Cong., 1st Sess., on S. 1126, pp. 5, 19 in *Legislative History, supra,* pp. 411, 425. See also id. pp. 501-2, and 1008. The legitimate economic reasons for seeking provisions requiring foreman in the printing industry to be union members are developed in the record (JA 272-292, 299). See also, Judge Hincks' opinion in *News Syndicate* App. 35a-36a) and Judge Swygert's opinion in *Evans* v. *ITU,* 81 F. Supp. 675 at 685 (N.D. Ind., 1948).

(1960); *NLRB* v. *Insurance Agents*, 361 U.S. 477 (1960)) for a clause requiring foremen to be union members, a clause which it expressly made lawful under Sections 2(3) and (11) and 14(a) of the Act.

If there was any ambiguity in the foreman proposals, as we feel there is not, the proposed contract provided full machinery for arbitrating "all disputes which may arise as to the construction to be placed upon any clause of the Agreement" (JA 353). It was error for the Board and the Court to undertake to interpret the meaning of these discrete clauses of the proposal, before any complete agreement had been reached, before it had been applied, and before the parties, through the contract machinery or otherwise, had had an opportunity to interpret it. The Court's interpretation is entirely gratuitous, and is unsupported by any record evidence or Board findings. The decision in *American Newspaper Publishers Association* v. *NLRB*, 193 F. 2d 782, 805 (CA 7, 1951) *cert. den.*, 344 U.S. 816, (1952) was expressly rested on findings that the foreman proposals were part of a "general scheme" to achieve closed shop conditions. Such findings are completely lacking here.

The Board further found (JA 481, n. 2) and the Court enforced its holding (App. 10a) that the demand for these clauses violated Section 8(b)(2) of the Act. The Court failed entirely to deal with petitioners' argument that a *proposal*, made in the course of collective bargaining negotiations, cannot be said to be an "attempt" to cause discrimination, before an entire agreement has been reached, a point lightly adumbrated, but not decided, in *NLRB* v. *American National*

Insurance Co., 343 U.S. 395, 405, fn. 15 (1952). It held that "the effect of the clause would be to cause the employers to discriminate in favor of union men in appointing their foremen, thereby encouraging aspirants for that position to join the union" (App. 10a). This ground was not advanced by the Board (see JA 457-458) and it was improper for the Court to substitute its own *rationale*. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); 318 U.S. 80, 93-95 (1943). Indeed, the wisdom of the *Chenery* rule is sharply illustrated by this very case for, as was pointed out to the Court by petition for rehearing, the ground adopted by it appears to have been rejected by the Board itself. *F. H. McGraw & Co.*, 99 NLRB 695, 696 (1952); *Pacific Shipowners' Association*, 98 NLRB 582, 596 (1952).

As the Court of Appeals noted in *News Syndicate* (App. 36a), any employer "is of course entitled to employ only Union foremen, if it so desires. Section 2(3) & (11), 14(a) of the Act." The demand for this clause could not violate Section 8(b)(2), and it is quite irrelevant that this "might encourage aspirants for that position to join the union" since Section 8(a)(3) "does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is forbidden." *Radio Officers* v. *NLRB*, 347 U.S. 17, 42-43 (1954).

c. The "Refusal to Bargain"

The Trial Examiner found (JA 456), and the Board and the Court below did not disturb the finding, that " . . . the Respondents were desirous of securing contracts with the companies". The finding that the petitioners had refused to bargain collectively in good

faith, as required by Section 8(d) of the Act, rests solely on the asserted illegality of the two clauses. If they are lawful, this finding must also fall.

The Court below characterized these demands as "clauses of honestly disputable validity at the time of the union action." (App. 14a). It nonetheless held that "the unions were acting at their peril," (id.), that to hold otherwise would "put a premium on ignorance of the law or blind intransigency" (App. 11a), and sustained the finding of a want of good faith.

We suggest the problem is more difficult than indicated by the Court below, as illustrated by this very case. The complaints herein (JA 5, 15) attacked the contract proposals, and the General Laws, dealing with "unfair goods". The petitioners defended them. While the case was in litigation, this Court, in *Local 1976, Carpenters* v. *NLRB*, 357 U.S. 93, 101-104 (1958) recited at length the vacillations and changes of position of the Board on the legality of such clauses, and held them to be lawful. *Id.* at 108. This attack was thereupon quietly dropped. Had this Court's decision gone the other way, the Board would doubtless insist that the petitioners had shown a lack of "good faith" in not properly anticipating this Court's ruling.

Does an admittedly honest dispute about the legality of proposed contract clauses show a want of good faith? May the Board and the courts use such a dispute as a device to find bad faith, before an entire agreement has been reached, where there remains the possibility that those proposals may be varied or modified, or their reach and meaning altered by other contractual provisions?

As labor law becomes ever more complex, and as the Labor Board constantly seeks to expand the reach

of its jurisdiction over these matters in an increasingly vacillating fashion, we suggest that it is in the national interest that parties be granted the same freedom to negotiate concerning the legality of proposals as they have on other issues. Though this important question was expressly "put aside" in *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 405, fn. 15 (1952), that case is the Board's chief reliance here (JA 456).

CONCLUSION

The issue here was succinctly summarized by an attorney for the Board in yet another case involving the laws and foreman clauses. In *Matter of Salt Lake City Mailers Union No. 21, ITU,* Case No. 20-CB-658, n. 4, *supra,* at R. p. 76, the attorney for the General Counsel, in objecting to evidence proffered by the respondents to show that the terms of the agreement had been in fact administered in non-discriminatory fashion, stated the General Counsel's position to be

> ". . . that it does not matter what their practices are, does not matter what they understand, if they are not willing to follow the instructions of the Labor Board as to how contracts should be written, then they are to be held liable and penalized. And I think that's the issue that the ITU sees and why it litigates these cases; that it doesn't believe that it should be told how to write collective bargaining agreements".

A careful re-reading of the statute has failed to disclose any language authorizing the Board to issue "instructions . . . as to how contracts should be written". This Court has four times held to the contrary. *NLRB* v. *American Insurance Co.*, 343 U.S. 395, 404 (1952);

Local 1976, Carpenters v. *NLRB*, 357 U.S. 93, 108 (1958); *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283, 295 (1959); *NLRB* v. *Insurance Agents*, 361 U.S. 477, 490, 498 (1960).

For the reasons set forth above, we respectfully urge that the petition for certiorari be granted. In our view, the decisions of Chief Judge Prettyman in *Honolulu Star-Bulletin* and of Judge Hincks in *News Syndicate* are so carefully and compellingly reasoned as to warrant consideration by this Court of summary reversal of the decision below without the filing of further briefs or oral argument.

Respectfully submitted,

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